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CHARLES ELLIOTT, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 28.

**The Brotherhood of Railroad Trainmen, Enterprise
Local No. 27, et al., Petitioners,**

v.

Toledo, Peoria & Western Railroad, Respondent.

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Seventh Circuit.

ADDITIONAL BRIEF OF RESPONDENT.

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LODGE NO. 27, ET AL., *Petitioners*,

v.

TOLEDO, PEORIA & WESTERN RAILROAD, *Respondent*.

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—
ADDITIONAL BRIEF OF RESPONDENT.
—

Respondent is obliged to file this additional Brief to correct many inaccurate and misleading statements of fact by Petitioners. In Respondent's original Brief, an attempt was made to correct these inaccuracies; but in their Reply, Petitioners have repeated many of them.

—
In Petitioners' original Brief (P. 3), they say the Brotherhoods called a strike for December 9, 1941, but agreed to an indefinite postponement.

The Record shows that the Brotherhoods' strike notice to Respondent was dated December 8, 1941, and that the

exact time of its receipt by Respondent was 11:44 A.M. that day. The notice provided that the strike would be effective at 11:00 A.M. Tuesday, December 9, 1941. (R. 786.) These facts, clearly established by the testimony, show that the Brotherhoods called this strike after Pearl Harbor.

Petitioners further state that the Brotherhoods agreed to an indefinite postponement of the strike after Pearl Harbor. The fact is that the strike notice was at no time withdrawn, although it was temporarily withheld until 11:15 A.M. December 28, 1941, when the Brotherhoods gave Respondent notice that they would discontinue their employment at 6:00 P.M. that same day. (R. 786, 787.)

On Monday, December 29, 1941, Respondent served a written notice personally upon each one of the employees involved, requesting them to report for work at 9:00 A.M. Tuesday morning December 30, 1941. (R. 787.)

Petitioners, in Brief (P. 3), state that on December 17th and again on December 28th the National Mediation Board requested the Railroad and the Brotherhoods to submit to arbitration and that the Brotherhoods agreed but the Railroad refused. Petitioners' statement is incorrect. On November 21, 1941, the National Mediation Board requested both parties to agree to arbitration. *Both parties then declined to submit the dispute to arbitration.* The Record shows letters from the two Vice Presidents of the Brotherhoods to the National Mediation Board in which they declined to submit the dispute to arbitration. These are Exhibits 27 and 28 (R. 780). These letters, written by the Brotherhoods to the Secretary of the National Mediation Board are dated November 8th, and on that date both Brotherhoods definitely stated their unwillingness to submit the dispute in question to arbitration.

The Record shows that the Brotherhoods had not agreed to arbitrate on December 17th (R. 791) and that notice of their agreement to arbitrate was not received by Respon-

dent until after the Brotherhoods had served notice upon Respondent on December 28, 1941, advising Respondent of the effective hour of the strike later that afternoon, and Respondent had wired the National Mediation Board to that effect and later received the Board's reply a few hours before the strike became effective. (R. 791.)

The above facts correct the inference obtained from reading Petitioners' Brief (P. 3) and Reply (P. 9-11) that the Brotherhoods had always agreed to arbitrate.

The above facts are also submitted to correct the statement by Petitioners in Reply (P. 9) that the Railroad deliberately provoked this strike shortly after the war began. The strike was put into effect by the Brotherhoods after Pearl Harbor to force the Railroad to agree to their demands. The undisputed testimony (R. 782) is that the representatives of the Brotherhoods informed the Railroad on November 6, 1941, that they would not suggest a rate of pay for which they would be willing to agree to the rules and working conditions submitted by Respondent. (See, original Brief of Respondent; P. 53.)

In Petitioners' Summary of Argument (P. 7), they state that the Railroad is now federally operated because of the Railroad management's refusal to settle the labor dispute. This is not a true statement of the facts. The Brotherhoods arbitrarily discontinued mediation by refusing to state a rate of pay for which they would continue in the employ of the Railroad under the Railroad's proposals (R. 782). That arbitrary attitude, together with the unrestrained violence against Respondent's property and employees, were two factors which caused the President to take possession of the property.

After the Injunction Order was entered, certain of the Petitioners wilfully refused to obey the Injunction, and continued their acts of violence against the employees and the property. (R. 985-990.) The Order for Injunction was entered on January 19, 1942, and was immediately served upon all the Petitioners and the public officers charged with preserving the peace in the vicinity of the property, as is required by statute.

On February 9, 1942, the District Judge found, in an order signed at that time, that certain of the Petitioners were refusing to comply with or obey the terms of the Temporary Injunction and directed by that order that the United States Marshal employ additional deputies for the purpose of enforcing the Court's order, the pay for said deputies to be borne by the Respondent and taxed as costs in the case. (R. 986, 987.)

The Marshal refused to employ additional deputies, and did not obey the order of the Court and enforce the Injunction for the protection of the Respondent's property and employees. Therefore, the Writ of Injunction became a nullity so far as the protection to Respondent's property and employees was concerned. On February 9, 1942, the Court entered orders against certain Respondents to appear and show cause why they should not be punished for contempt of Court in the violation of said Injunction. (See Orders to Show Cause in Contempt Proceedings, R. 985, 987, 988, 989, and 990.)

To other factors contributing to the seizure of the railroad were:

1. The failure of the National Mediation Board to comply with the repeated request of Respondent and suggest to the President the appointment of an Emergency Board. (See further suggestions on this point, Respondent's Brief (P. 53-58).

2. The failure of the Brotherhoods to abide by the agreement of labor made with the President of the United States that there should be no strikes or stoppage of work for the

duration of the War, which agreement was made after Pearl Harbor and before the strike became effective in the instant case.

Contrary to the facts in the Record, counsel for Petitioners has persisted in making the statement that the violence was of a minor nature; and in the Reply (P. 1-2) he states that the acts of violence were confined to an exchange of blows between pickets and a strike breaker, and an incident where a bottle of inflammable liquid was thrown upon an engine, and several times when rocks were thrown at passing trains. If counsel for Petitioners had read the testimony appearing in the Record, to which Respondent makes reference in the Brief filed herein on Pages 39-45, he would not have made the unqualified statement which appears in Petitioners' original brief (P. 3) and the Reply (P. 2). Not only were freight trains carrying interstate commerce stopped as a result of violence and employees brutally assaulted (in two instances rendered unconscious by reason of violence), but connecting carriers were likewise prevented by violence or threats of violence from making deliveries or transfers of interstate freight to Respondent.

On December 29, 1941, the Peoria & Pekin & Union Railway (a terminal railroad serving various roads in Peoria) attempted to make a delivery to Respondent of a cut of cars containing interstate freight. This delivery was prevented by reason of the threats of violence of Petitioners (R. 589-594) and all of the cars were returned to the yards of the P. & P. U. A list of these cars is shown by Exhibit 9. (R. 612.)

On January 2, 1942, there were other interstate cars for delivery by this terminal railroad to the Respondent; and the Superintendent of the P. & P. U., learning of the violence occurring upon Respondent's Railroad, had a meeting with Coyle and Keiser, Vice Presidents of the two

Brotherhoods, and the local General Chairmen on the P. & P. U. The testimony of the Superintendent of the P. & P. U. shows (R. 593, 594) that because of the element of danger to his men, the terminal railroad refused to make any further deliveries of interstate freight to Respondent until after the temporary restraining order was issued.

The Yard Master for the Burlington Railroad testified as to threats of violence to his men in attempting to make delivery interstate freight from the Burlington Railroad to Respondent. (See testimony of Earl Marts, R. 595, 602.)

On January 2, 1942, about 3:00 P.M., Marts attempted to make a delivery of fifteen cars, some of which contained interstate freight, and was prevented from making the delivery because of the mob which stopped the engine and cut of cars in East Peoria, Illinois, one block from the Police Station. Marts asked the Chief of Police to give protection to his men if he attempted to cross the picket line and make the delivery. In the presence of some of the representatives of the Petitioners, he asked the Chief of Police this question (R. 597):

“You refuse to grant us protection??”

The Chief of Police answered, “I do, because I haven’t men enough.”

Finally the strikers permitted Marts to disconnect the engine drawing the cars to cross the picket line for the purpose of reaching a switch so as to back up and connect with the rear car in the cut so that the cars might be returned to the Burlington yards. Therefore, the cars were not delivered because of the threats of violence to the men of the Burlington Railroad, which threats were made in the presence of the Chief of Police, who refused to enforce the law and protect men who were not in the employ of Respondent and had nothing whatsoever to do with the strike. Exhibit 17 shows a list of the interstate cars in the Burlington transfer cut above referred to. (R. 613.)

The other interference with the delivery or transfer of interstate freight occurred on December 31, 1941, at Sword's Siding. For the facts with reference to that transaction and the vicious assault upon the firemen, see Respondent's Brief. (P. 39, 40.) (Also, see Exhibit 12 (R. 613) for list of interstate cars in this cut.)

For further Record references on the question of the extent of violence, see Respondent's original Brief, under point IV, Pages 36 to 45.

In Petitioners' Brief (P. 36) the statement is made that there was no evidence of threats of violence on December 17 and December 28, 1941. This statement is incorrect. The following appears in the evidence (R. 720):

"There had been threats conveyed to us before the strike started that no train would ever reach the Illinois River Bridge going west, and no train get to Washington going east."

Also, (R. 738):

"There had been some threats, as I testified, that if the strike went into effect, that nobody would be alive when a train got to the Illinois River Bridge, there would be no train that would ever get to the Illinois River Bridge."

There was no denial of this testimony by any of the Petitioners who were charged with making these threats.

In Petitioners' reply (P. 9), an inaccurate statement is made with reference to the "Findings of Fact" by the trial Court. Petitioners say:

"the Court merely found that the railroad has complied with the obligation imposed on it by law. *** At no place did the District Court ever find that it had made every reasonable effort to settle the dispute."

To correct this, we quote that entire finding of fact. (R. 970):

"(d) That the plaintiff has in good faith complied with all of the provisions of the Railway Labor Act in endeavoring to reach an agreement with the Brotherhoods and its employees; that the plaintiff has complied with all its obligations imposed upon it by the laws of the United States relating to Labor disputes."

Following their incomplete quotation above mentioned, Petitioners quote one paragraph of the oral statement of the trial Court. Without extending this Brief, we respectfully refer this Court to the complete statement of Judge Adair. (R. 954-957.)

III.

The point raised in Petitioner's Brief under III (P. 22) is the question of whether a Federal Court has jurisdiction of the subject matter of this action.

Respondent submits the following additional authorities in support of its argument under Point III of its Brief (P. 23-36):

The Constitution of the United States, Sec. 8, Clause 3, vested power in Congress to regulate commerce with foreign nations and among the several states and with the Indian Tribes. On June 15, 1866, Congress passed a statute, which is now Title 45, Sec. 84. So far as said section relates to this question, it is as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

This statute was originally known as R. S. #5258.

Following the enactment of this statute, Congress passed the Interstate Commerce Act and the Transportation Act; and by so doing, assumed exclusive jurisdiction in the field of interstate commerce so far as it relates to railroads. By these acts, it excluded all interference by the states.

This Court has repeatedly recognized the effect of the above statute, R. S. #5258, and has held that any acts which directly burden or obstruct interstate or foreign commerce or its free flow are within the reach of the Congressional power.

In instant case, one of the questions for the District Court to determine was whether or not the acts of the Petitioners in committing violence constituted an obstruction to the free flow of interstate commerce, and that decision involved a Federal question.

In *Robbins v. Shelby County Taxing District*, 120 U. S. 489 at 493, this Court in 1886 said:

"Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom."

Also, at Page 494, said:

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

Also, see *Chicago, Rock Island, & Pacific Ry. Co. v. Harwick Farmers Elevator Co.*, 226, U. S. 426; *Adams Express Co. v. Kentucky*, 214 U. S. 218 (1908).

In the case last above cited, this Court held that by the above statute, R. S. #5258, Congress authorized every rail-

road company to carry freight over its road and to receive compensation therefor, and any exercise of state authority regulating that commerce is repugnant to the commerce clause of the constitution.

In *Pullman Co. v. Linké, et al.*, 203 Fed. 1017 (1913) the Court held that an attachment levied upon a pullman car, which attachment was issued under a valid law of the State of Ohio, not merely incidentally and indirectly affected interstate commerce, but bore upon it so directly as to amount to its regulation.

Also, see *Galveston Ry. Co. v. Tex.*, 210 U. S. 217, 227.

A very clear statement of this principle may be found in 20 *Harvard Law Review*, Pages 319-320, and is as follows:

“But an attachment, whether of ears of a resident or non-resident carrier, which directly stops the delivery of interstate freight is very different. Though aimed to secure debts, it has a direct effect upon articles of interstate commerce not connected with the debt. * * * An attachment of this nature may be said to regulate interstate commerce. Moreover, as a regulation, it is clearly contrary to the intent of Congress, for it would either greatly delay or cause the trans-shipment of interstate freight—just those inconveniences which the federal statute authorizing arrangements for continuous carriage was passed to avoid.”

In *National Labor Relations Board v. Jones & Laughlin*, 300 U. S. 1, at 31, 32, the Court held:

“It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the Congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. See *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548, 570; *Schechter Corp. v. United States*, *supra*, pp. 544, 545; *Virginian Railway v. System Federation*, No. 40, 300 U. S. 515. It is the effect upon commerce, not the source of the injury which is the criterion. *Second Employers' Liability Cases*, 223 U. S. 1, 51.”

And in *Second Employers' Liability Cases*, 223 U. S. 1, the Court said:

"To regulate', in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large."

For additional cases on this point, Respondent refers to those cited in the opinion of the Circuit Court of Appeals in instant case. (R. 1026, 1027)

Petitioners argue that because there is no Federal statute specifically defining the remedy by injunction for the interference by violence with the movement of interstate commerce, the Court is without jurisdiction to entertain this suit.

In *Sprague v. Ticonic*, 307 U. S. 161, at 164, the Court held:

"The suits 'in equity,' of which these courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which heretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress, e.g., *Michaelson v. United States*, 266 U. S. 42."

Rule I of the Rules of Civil Procedure for District Courts of the United States, promulgated by this Court under an Act of 1934, recognizes equity jurisdiction in the Federal Courts.

In *Virginian Railway Co. v. System Federation*, 300 U. S. at 515, the Court held that where there is no adequate remedy at law the extent to which equity will go to give relief is not a matter of fixed rule, but the right rests in the sound discretion of the court.

The *Norris-La Guardia Act*, Title 29, Sec. 52, preserves the right of injunctive relief in cases between employer and employees, where it is necessary to prevent irreparable injury to property, and where the acts complained of constitute violence or threats of violence.

In support of their position of lack of jurisdiction, Petitioners argue that Federal law imposes upon common carriers by truck the duty to furnish transportation and facilities and that under the reasoning of the Circuit Court of Appeals in instant case, a trucker would have a federal right to be free from any act obstructing or impeding the movement of his truck, and a remedy in the federal courts for his damage.

In Petitioners' Reply (P. 7) *Sharp v. Barnhart*, 117 F. 2d. 604, is referred to with the comment that that decision supports their contention. In that case the truck was stopped by the Indiana police for improper plates, no direction lights, and no flags or flares. This act of stopping the truck was permissible because of a reasonable state regulation relating to the use of the highways which belong to the state. The truck in that case was not licensed under the Federal Motor Carrier Act.

An examination of Sec. b of Paragraph 302 of Title 49 U. S. C. A. will disclose that Congress in passing the Federal Motor Carrier Act reserved to the states the authority to control the highways by reasonable regulations. All that is said by Petitioners in their Brief (P. 30 and 31) and Reply (P. 7) is fully answered by the statement of the Circuit Court of Appeals of the Seventh Circuit in deciding the above case, at Page 607 of the Opinion, as follows:

"Hence, for both reasons (a) that the appellants had no permits as provided by the Federal Motor Carrier Act, so as to bring themselves within the protection of the Act, and (b) because the Federal Motor Carrier Act has not yet been extended to cover ordinary traffic safety regulations, neither action is within the exception of 28 U. S. C. A. #41 (8), which grants the Federal Court jurisdiction of 'suits under the interstate commerce laws,' irrespective of the jurisdictional amount involved."

Respectfully submitted,

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